CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 214

MRS. ABA BADGER SUTTLE, WIDOW OF JOHN G. SUTTLE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN G. SUTTLE, DECEASED, ETC., PETITIONER,

vs.

REICH BROS. CONSTRUCTION CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 16, 1947.

CERTIORARI GRANTED OCTOBER 13, 1947.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 11849.

MRS. ABA BADGER, widow of JOHN G. SUTTLE, individually and as administratrix of the Estate of JOHN G. SUTTLE, deceased, etc.,

Appellant,

versus

REICH BROS. CONSTRUCTION COMPANY, ET AL.,

Appellee.

DESIGNATION OF APPELLANTS AS TO THE PRINTING OF THE RECORD.

Filed Dec. 9, 1946.

To the Clerk of the United States Circuit Court of Appeals, Fifth Circuit:

Appellant designates that the following portion of the transcript of record in the above entitled and numbered cause be omitted from the printed record, to-wit:

Page 8—Notice of hearing of motion to dismiss.

Pages 11-12-13-14 and down to the prayer of the motion for a new trial on page 15; said omitted pages containing only the argument and authorities cited by the plaintiff in support of the motion for new trial, as required by the rules of the District Court.

Page 16—Statement of counsel for plaintiff as to oral argument on the motion for new trial.

Appellant designates that all of the balance of the record brought up on appeal be printed.

JOHN D. MILLER,
Counsel for Appellant.

We consent to the printing of record on appeal as outlined in the above designation.

J. T. OWEN,
Counsel for Appellee.

United States of America.

District Court of the United States, Eastern District of Louisiana, Baton Rouge Division.

No. 387 (Civil Action).

Mrs. Aba Badger, Widow of John G. Suttle, Individually and for her minor child, Sylvia Suttle,

versus

Reich Bros. Construction Co., Cleve E. Reich, Montie C. Reich and Highway Insurance Underwriters.

Appearances:

Messrs. Miller & Block, (John D. Miller, Esq.),
Messrs. Engle, Laub, Adams & Forman,
Natchez, Mississippi,
Messrs. Blair & Anderson,
Tupelo, Mississippi,
Attorneys for Plaintiffs-Appellants.

Messrs. Porteous & Johnson (F. Carter Johnson, Jr., Esq.),
Messrs. Jones, Kimball & Owen (Allen Kimball, Esq.),
P. O. Box 1322, Lake Charles, La.,
Messrs. Durrett & Hardin (Calvin E. Hardin, Jr., Esq.),
La. Natl. Bk. Bldg., Baton Rouge, La.,
Attorneys for Defendants-Appellees.

APPEAL from the District Court of the United States for the Eastern District of Louisiana, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 20th day of November, 1946, at the City of New Orleans, Louisiana.

TRANSCRIPT OF RECORD.

COMPLAINT.

Filed August 2nd, 1946.

(Number and Title Omitted.)

Mrs. Aba Badger, widow of John G. Suttle, a resident of the County of Lee, and State of Mississippi, and a citizen of said State, Plaintiff, complains of Reich Bros. Construction Co., a commercial partnership domiciled in the City of Jennings, Louisiana, and composed of Cleve E. Reich and Montie C. Reich, and the said partners both of full age and residents of said City of Jennings, and citizens of the State of Louisiana, and of Highway Insurance Underwriters, public liability insurer of said above named parties, a corporation organized and existing under the laws of the State of Texas and domiciled in the City of Austin in said State, duly licensed to transact business in Louisiana with an Agent for service of process in the City of Baton Rouge in this District, and shows that this is a suit of a civil nature, wholly between citizens of different States, and involves in each of its parts sums in excess of Three Thousand & No/100 ($3,000.00) Dollars.

First Count.

I.

Plaintiff, as the surviving widow of John G. Suttle, and as the duly appointed guardian of Sylvia Suttle, minor daughter of her marriage with John G. Suttle, deceased, appointed as such guardian by the Chancery Court of Lee County, Mississippi, in which County said minor resides, shows that on or about December 10, 1945, a large truck and trailer, the property of said Reich Bros. Construction Co., at or about 6:30 P. M., was being negligently driven and negligently operated on U. S. Highway No. 190, at or near the town of Goodbee, in St. Tammany Parish, Louisiana, in an Easterly direction, when it collided with an automobile being driven at the same place in a Westerly direction by plaintiff's late husband, John G. Suttle, killing plaintiff's said husband and their daughter, Adair Dorothy Suttle, and completely wrecking the Chevrolet sedan, the property of plaintiff's said husband in which at the time plaintiff, her said husband, and her said two daughters were riding;

II.

That the said truck and trailer at the time were being driven and operated by an employee and servant of said Reich Bros. Construction Co., in and about the business of said company and by said agent and servant within the scope of his authority; and the said servant and employee of defendants and the defendants were all guilty of negligence in the manner in which said trailer was loaded with a dragline which was allowed to extend beyond the width of the trailer, which is of the maximum width allowed by law, to-wit; eight (8') feet;

and it was negligence on the part of all of said parties to operate said truck and trailer in the manner and under the circumstances herein stated with deficient lights and otherwise as stated herein, and at the time and place of said collision;

III.

That the negligence of defendants, their servants and employees, was the proximate cause of said accident and collision herein set forth, and among other acts of negligence, the said defendants and their servants and employees were guilty of the following acts of negligence:

That the trailer attached to the said truck was loaded with large heavy machinery, having a total width of approximately twelve (12') feet, and was driving on a road only twenty (20') feet wide, so that it extended past the middle of the said road; that the said trailer was not lighted at the sides and the truck was not lighted as required by the laws and regulations of the State of Louisiana; that the said oversize truck and trailer was being driven on the said Highway pursuant to a permit issued by the State Highway Police of Louisiana, which permit expired at sunset on said day; that the night was dark and overcast; that plaintiff's said husband was driving carefully on his right side of the road and it was impossible for him to see the extension of the said heavy trailer and machinery on his side of the road; that the overhanging machinery struck the left front side of the said Chevrolet car, tearing it open along the left side thereof, causing the death of plaintiff's said husband and of the said Adair Dorothy Suttle, and completely demolishing the said car, and seriously injuring plaintiff and her said minor daughter, Sylvia;

Also, in that the driver of said truck and trailer saw, or could be the exercise of diligence and by keeping a proper lookout, have seen the car driven by the said John G. Suttle, deceased, appoaching, the Highway at said point of collision being straight for several hundred yards each way, and the car so driven having proper lights and being driven at the time on its proper side of the highway, and the driver of said truck and trailer well knowing the facts and circumstances hereinabove alleged, and particularly well knowing that the trailer with the machinery thereon extended beyond the sides of the trailer and the fact of the improper and insufficient lighting of said trailer on the sides, and other facts hereinbefore alleged, and the further fact that the driver of the oncoming car, because of darkness and the insufficient and improper lighting of the truck and trailer, could not know that the load on the trailer extended beyond the sides and width of the trailer and the width of the truck, should in the exercise of reasonable care and caution have pulled his truck over to his right side, partly on the shoulder of said road, a sufficient distance to allow the oncoming car to pass the trailer after it had safely passed the cab of the truck and the body of the truck; but instead, the driver of said truck, with full knowledge of the facts and circumstances as herein averred, did not allow sufficient clearance space, all of the circumstances and facts considered thereby proximately causing the said collision and damage, as hereinabove averred;

That the said automobile of plaintiff's husband stopped almost immediately after said collision, but defendants' truck was not brought to a stop for almost one thousand feet.

IV.

Plaintiff claims for herself and for her minor daughter, Sylvia, damages for the death of their said husband and father, including loss of consortium, companionship and support, in the sum of Forty Thousand & No/100 ($40,000.00) Dollars of each defendant in solido, and as Administratrix of the Estate of John G. Suttle, duly appointed as such by the Chancery Court of Lee County, Mississippi, plaintiff claims damages as follows:

Damages to the said Chevrolet automobile.....	$1,000.00
Funeral expenses for John G. Suttle, Dec'd.....	315.00

Second Count.

V.

Plaintiff renews and reiterates each and every allegation as to the accident as set out in the First Count of this Complaint, and shows that she claims damages from each of the said defendants in solido for the death of her daughter, Adair Dorothy Suttle, in the sum of Forty Thousand & No/100 ($40,000.00) Dollars, and for the funeral expenses of her said daughter, the sum of Three Hundred Fifteen & 10/100 ($315.10) Dollars.

Third Count.

VI.

Plaintiff shows that she was severely injured in the accident described in the First Count of this Complaint, the allegations whereof are adopted and renewed herein; that she was rendered unconscious and suffered severe shock, pains and injuries, that she received numerous lacerations

and contusions and dislocation of the occyntal bones, from which injuries she is still suffering; that she claims of each of the defendants herein in solido the sum of Five Thousand & No/100 ($5,000.00) Dollars for injuries, pain, shock and disfigurement of the head, and One Thousand & No/100 ($1,000.00) Dollars for medical, hospital and ambulance expenses.

Fourth Count.

VII.

As the Mother and Guardian of her said minor child, Sylvia Suttle, for and on behalf of the said minor, plaintiff reiterates and renews the allegations of fact set out in the First Count hereof, and shows that in the said accident and the said minor suffered serious injuries, pain and shock; that she was knocked unconscious, and received serious contusions and lacerations of the scalp, forehead, face and chest, with severe and painful contusions of her body and extremities, for which she claims damages from each of the said defendants in solido in the sum of Five Thousand & No/100 ($5,000.00) Dollars, and One Thousand & No/100 ($1,000.00) Dollars for medical, surgical, hospital and ambulance expenses.

General Statement.

Plaintiff shows that the defendant, Highway Insurance Underwriters, had been authorized to transact a casualty business in the State of Louisiana and had issued its policy in favor of said defendant, Reich Bros. Construction Co., insuring said partnership against liability for personal injury, including death, and property damages, in connection with the operation of said truck and trailer, which policy

was in force and effect at the time of the accident described in the First Count of this Complaint.

Wherefore, she prays for summons and service upon each of the said defendants, and for judgment against each of them in solido for Ninety-Four Thousand, Six Hundred Thirty & 20/100 Dollars ($94,630.20), in the capacities and for the purposes in the foregoing Complaint set out, with interest at five (5%) percent per annum from December 10, 1945, until paid.

For costs, and for such relief as she may be entitled to receive.

(Sgd.) ENGLE, LAUB, ADAMS & FORMAN,

Natchez, Miss.

(Sgd.) BLAIR & ANDERSON,

Tupelo, Miss.

(Sgd.) MILLER & BLOCH,
(Sgd.) JOHN D. MILLER,

1014 Whitney Bldg.,
New Orleans, La.

Attorneys for Plaintiff.

MOTION TO DISMISS ON BEHALF OF REICH BROS. CONSTRUCTION CO., CLEVE E. REICH AND MONTIE C. REICH.

7 Filed August 26th, 1946.)

(Number and Title Omitted.)

Reich Bros. Construction Co., a commercial partnership composed of Cleve E. Reich and Montie C. Reich, and

Cleve E. Reich and Montie C. Reich, individually, made parties defendant herein, move the Court as follows:

1. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this Court is invoked solely on the ground of diversity of citizenship, and (b) the movers herein are domiciled and inhabitants of the Western District of the District Court of the United States, State of Louisiana, Lake Charles Division.

(Sgd.) J. T. OWEN,
Of JONES, KIMBALL & OWEN,
Attorneys for Movers.

Address: Lake Charles, La.

8 Notice of Hearing on Motion to Dismiss, omitted from the printed record, pursuant to Designation of Appellant as to Printing Record, copied at page 1.

* * * * * * * * *

9 MINUTE ENTRY.

October 3rd, 1946.

Caillouet, J.:

Hearing on Motion of Reich Bros. Construction Company Cleve E. Reich and Montie C. Reich and Order Granting Same.

(Number and Title Omitted.)

This cause came on this day to be heard on defendants' motion to dismiss;

Present:

Allan Kimball, Esq.,
William Porteous, Esq.,
C. E. Hardin, Esq.,
Attorneys for Defendants;
B. R. Forman, Jr., Esq.,
John D. Miller, Esq.,
Attorneys for Plaintiff.

Whereupon, after hearing argument of counsel for the respective parties;

It is Ordered that the motions of Reich Bros. Construction Co., Cleve E. Reich, Montie C. Reich to dismiss, be and the same are hereby granted, and that the suit is hereby dismissed, as to them.

It is Further Ordered that the motion of Highway Insurance Underwriters to dismiss, be, and the same is hereby, denied.

PLAINTIFF'S MOTION FOR NEW TRIAL.

Filed October 10th, 1946.

(Number and Title Omitted.)

Now into Court, through their undersigned attorneys, comes the plaintiff herein, Mrs. Aba Badger Suttle, individually and as guardian of the minor, Sylvia Suttle, and as administratrix of the Estate of John G. Suttle, deceased, and moves the Court to set aside the judgment dismissing this action as to the defendants, Reich Bros. Construction Co., Cleve E. Reich and Montie C. Reich, entry of which was directed by the Court as the hearing in Baton Rouge on October 3, 1946, and grant a new trial on said defendants' motion to dismiss this suit, on the ground that said judgment was contrary to law and prejudicial to plaintiff. Plaintiff specifies as ground for praying for such new trial the following:

(1) The formula adopted and applied by the Court, that a corporation can have but one domicile or residence, in this instance, the State of Texas, and being a non-resident of Louisiana the waiver of the corporate defendant to service of process in the Eastern District of Louisiana could not affect the partnership and individual defendants who reside in the Western District of the State, and that such defendants were right in objecting to the venue in this District as to them, is not the law as applied by the Federal Courts in several cases cited in plaintiff's brief, which cases were not referred to or, apparently, considered by the Court.

(2) Whether or not a corporation is a resident within a State or District is a matter of State law, binding upon the Federal Courts, there being no statute of the United

States governing such matter; and, in Louisiana, a foreign corporation which has complied with the requisites for domesticating itself here, it for jurisdictional and all other purposes a resident of the District in which it has appointed an Agent for the service of process, and is not a non-resident.

11 Argument and Authorities cited by Plaintiff in support of the Motion for New Trial, omitted from the Printed Record, pursuant to Designation of Appellant as to Printing Record, copied at page 1.

* * * * * * * * *

Wherefore, plaintiff respectfully prays that this motion for a new trial be granted and that the judgment dismissing this action as to the defendants, Reich Bros. and the partners of that firm, be recalled, annulled and set aside and they required to answer; plaintiff prays for a hearing on this motion at the next motion day in the Baton Rouge Division, or at such other time as this Honorable Court may be pleased to fix;

And for such other and further relief as in law and justice it may be entitled to receive.

(Sgd.) JOHN D. MILLER,
1014 Whitney Bldg.,
New Orleans, La.

(Sgd.) ENGLE, LAUB, ADAMS & FORMAN,
Natchez, Miss.

(Sgd.) BLAIR & ANDERSON,
Tupelo, Miss.

Attorneys for Plaintiff.

A copy of the foregoing motion for a new trial has been served on attorneys of record for Reich Bros. Construction Co. and the individual partners of said firm.

New Orleans, October 10th, 1946.

(Sgd.) JOHN D. MILLER,
Of Counsel.

16 Statement of Counsel for Plaintiff as to Oral Argument on the Motion for New Trial, omitted from the Printed Record, pursuant to Designation of Counsel as to Printing Record, copied at page 1.

* * * * * * * * *

MINUTE ENTRY.

November 12th, 1946.

Caillouet, J.:

Hearing on Plaintiff's Motion for New Trial and Order Denying Same.

(Number and Title Omitted.)

This cause came on to be heard on the motion of plaintiffs for a new trial from the judgment dismissing this action as to the defendants Reich Bros. Construction Co., Cleve Reich and Montie C. Reich, three of the defendants herein:

Present:

Calvin E. Hardin, Esq., Attorney for Highway Insurance Underwriters;

Plaintiffs, absent and unrepresented by counsel;

Calvin E. Hardin, Jr., counsel for Highway Insurance Underwriters, announced to the Court that he had no statement to make.

Whereupon, the Court concluded that, as counsel for the movers had, in effect, submitted the matter for determination, by his written signed appearance filed in the record, said motion for a new trial was properly before it for final disposition, and upon due consideration thereof, did, then and there, deny the same.

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18 NOTICE OF APPEAL.

Filed November 20, 1946.

(Number and Title Omitted.)

Notice is hereby given that Mrs. Aba Badger, widow of John G. Suttle, individually and as administratrix of the Estate of John G. Suttle, deceased, and as guardian of the minor, Sylvia Suttle, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the decree or order dismissing this suit as to the defendants, Reich Bros. Construction Company, Cleve E. Reich and Montie C. Reich, entered in this action on October 3, 1946, in respect to which a new trial was refused on the 12th day of November, 1946.

November 20, 1946.

(Sgd.) MILLER & BLOCH,
(Sgd.) JOHN D. MILLER,

1014 Whitney Bldg.,
New Orleans, La.

(Sgd.) ENGLE, LAUB, ADAMS & FORMAN,

Natchez, Miss.

(Sgd.) BLAIR & ANDERSON,

Tupelo, Miss.

19 APPEAL BOND.

(Filed November 20, 1946.)

(Number and Title Omitted.)

Know All Men By These Presents that we, Mrs. Aba Badger, widow of John G. Suttle, Individually, and as administratrix of the Estate of John Suttle, deceased, and as guardian of the minor, Sylvia Suttle, as Principal, and National Surety Corporation of New York as Surety, are held and firmly bound unto Reich Bros. Construction Co., Cleve E. Reich and Montie C. Reich in the full and just sum of Two Hundred Fifty & No/100 ($250.00) Dollars, to be paid to the said Reich Bros. Construction Co., Cleve E. Reich and Montie C. Reich, their successors, executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed and dated this the 20th day of November, 1946.

Whereas, on the 3rd day of October, 1946, in an action pending in the District Court of the United States for the Eastern District of Louisiana, Baton Rouge Division, between the above named principal as plaintiff and the above named obligees, as defendants, et als., an order was rendered against the said plaintiff, dismissing said cause as to the said named defendants, and the said plaintiff having filed a notice of appeal from such order to the Circuit Court of Appeals for the Fifth Circuit;

Now, the condition of this obligation is such, that if the said plaintiff shall prosecute her appeal to effect and shall pay costs if the appeal is dismissed or the said order

affirmed, or such costs as the said Circuit Court of Appeals may award against the said plaintiff if the said order is modified or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

(Sgd.) MRS. ABA BADGER SUTTLE,
By (Sgd.) JOHN D. MILLER, Atty.

NATIONAL SURETY CORPORATION, NEW YORK, N. Y.,
By (Sgd.) AUGUSTE COIRON,
Atty. in Fact.

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20 DESIGNATION OF CONTENTS.

Filed November 21, 1946.

(Number and Title Omitted.)

To the Hon. Dallam A. O'Brien, Jr., Clerk:

In preparing the transcript in this matter for the Circuit Court of Appeals please include the following documents:

1. The complaint;

2. The motion to dismiss filed on behalf of Reich Bros. Construction Co., Cleve E. Reich and Montie C. Reich.

3. The order dismissing this case as to the defendants named in No. 2 above, entered on October 3, 1946;

4. Plaintiff's motion for a new trial of said order;

5. The order over-ruling the said motion for a new trial, entered November 12, 1946;

6. Plaintiff's notice of appeal, filed November 20, 1946;

7. The appeal bond filed by plaintiff November 20, 1946;

Being the entire record between appellant and appellees.

November 20, 1946.

(Sgd.) JOHN D. MILLER,
(John D. Miller),
Of Counsel for Plaintiff.

1014 Whitney Building,
New Orleans, La.

Copy of the foregoing designation of the record has been served on the Attorneys of record for the appellees named therein.

(Sgd.) JOHN D. MILLER,
Of Counsel.

Clerk's Office.

I, A. DALLAM O'BRIEN, JR., Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 20 pages contain and form a full, true and complete transcript of the record in the case entitled "Mrs. Aba Badger, Widow of John G. Suttle, Individually and for her minor child, Sylvia Suttle, versus Reich Bros. Construction Co., Cleve E. Reich, Montie C. Reich, and Highway Insurance Underwriters," No. 387 of the Civil Action Docket of this Court, Baton Rouge Division, as made up in accordance with the Designation of Contents copied herein.

Witness my hand and the seal of said Court at the City of New Orleans, La., this 3rd day of December, A. D. 1946.

A. DALLAM O'BRIEN, JR.,
Clerk,
By ANDREW J. BACON,
Deputy Clerk.

(Seal)

[fol. 20] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of April 16th, 1947

No. 11849

MRS. ABA BADGER, Widow of John G. Suttle, Individually and as Administratrix of the Estate of John G. Suttle, Deceased, etc.,

versus

REICH BROS. CONSTRUCTION CO., et al.

On this day this cause was called, and, after argument by John D. Miller, Esq., and C. F. Engle, Esq., for appellant, and George T. Owen, Jr., Esq., for appellees, was submitted to the Court.

[fol. 21] OPINION OF THE COURT—Filed April 30, 1947

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11849

MRS. ABA BADGER, Widow of John G. Suttle, Individually and as Administratrix of the Estate of John G. Suttle, Deceased, etc., Appellant

versus

REICH BROS. CONSTRUCTION CO., et al., Appellees

Appeal from the District Court of the United States for the Eastern District of Louisiana

April 30, 1947

Before Hutcheson, McCord, and Waller, Circuit Judges

WALLER, Circuit Judge:

The question involved is whether, under Section 113 of [fol. 22] Title 28, U. S. C.,[1] the venue was properly laid in

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[1] "When a state contains more than one district, every suit not of a local nature, in the district court thereof,

the Eastern District of Louisiana, where the suit was brought.

The defendant, Highway Insurance Underwriters, is a corporation under the laws of Texas, domiciled, according to its charter, in Austin, but in qualifying to do business in Louisiana it complied with the Louisiana statutes and appointed a resident agent in the Eastern District of Louisiana for the service of process upon it. The other defendants are all non corporate and reside in the Western District of Louisiana.

Jurisdiction of the Federal Court in the Western District of Louisiana is conceded, but all of the defendants except the Texas corporation say that since no defendant resides in the Eastern District, the suit cannot, in the face of their objections, be maintained in the Eastern District. The plaintiff—the Appellant here—counters with the response that the Texas corporation, under the decision in *Neirbo v. Bethlehem Shipbuilding Co.*, 308 U. S. 165, should be held to have waived the right to be sued at its corporative domicile and by reason thereof it became suable in the Eastern District to the same extent as would a resident of that District. To all intents and purposes, the plaintiff says, the corporation is a resident of the Eastern District of Louisiana to the same extent as a domestic corporation domiciled in that District. In collateral support of this contention Appellant cites state statutes [2] and decisions holding that foreign corporations that have [fol. 23] appointed resident agents under the statute become domesticated to the extent that they should be con-

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against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides." Sec. 113, Title 28, U. S. C.

[2] Act 267 of 1914, as amended by Act 120 of 1920; Article 240, Louisiana Code of Practice.

sidered as domestic corporations, which, for instance, are not subject to attachment as non-residents.[3]

Appellees' answer to this is that Appellant cannot augment or diminish the Federal statutes of jurisdiction and venue by invoking state statutes and state decisions.

The lower Court dismissed the suit as to the defendants residing in the Western District, but allowed the case to stand as to the Texas corporation. From this judgment the plaintiff appealed.

The lower Court did what should have been done.[4] The question must be decided under Federal law for it is apparent that if a foreign corporation which had qualified under the state statutes to do business in Louisiana were held to be an inhabitant, resident, or citizen of Louisiana to the same extent as a domestic corporation, then no citizen of Louisiana could sue such a foreign corporation in the Federal Courts of that state, nor could such a case be removed to the Federal Court. The impact of such a holding on the jurisdiction of the Federal Courts would be so devastating that if such a result is to be achieved it must come through Congressional legislation rather than through state statutes and decisions thereon.

[fol. 24] That a corporation is a resident within the Federal statutes of jurisdiction and venue only at the place where it is located under its charter is too well settled and too sound in the law to be doubted now. In *Ex Parte Schollenberger*, 96 U. S. 369, rendered in 1877, the Court said:

> "States cannot by their legislation confer jurisdiction upon the courts of the United States, neither can consent of parties give jurisdiction when the facts do not; but both State legislation and consent of parties may bring about a state of facts which will authorize

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[3] *Burgin Bros. v. Barker Baking Co.*, 152 La. 1075, 95 So. 227; *Fullilove v. Central State Bank*, 160 La. 831, 107 So. 590; *Palmer v. Avalon Oil Co.*, 10 La. App. 512, 120 So. 781.

[4] *Murphree v. Mississippi Publishing Corporation*, 149 F. 2d. 138.

the courts of the United States to take cognizance of a case."

* * * * * * *

"A corporation cannot change its residence or its citizenship. It can have its legal home at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter or excluded by local laws."

See also *Fairbanks Shovel Company v. Wills*, 240 U. S. 642; *Gorman v. A. B. Leech and Company*, 11 F. 2d 454; *Creagar v. P. F. Collier & Son*, 36 F. 2d 781.

It is settled by the *Neirbo* case that the defendant corporation has waived the right to insist upon being sued at its domicile by its acceptance of the Louisiana statute so that it may be sued in either district of Louisiana, but such waiver cannot bind the individual co-defendants in this case. It is this implied waiver that allows the [fol. 25] corporate defendant to be sued in the Eastern District of Louisiana in the absence of residence therein by any one of the other defendants.

The jurisdiction of the Federal District Courts is limited. It is entirely statutory and must always be made clearly to appear. For the same reason the venue cannot be other than that prescribed by the statute unless the provisions of the statute are waived.

Since the corporate defendant was neither a resident nor an inhabitant of the Eastern District of Louisiana, and since its implied waiver was not a valid waiver on behalf of its co-defendants, it follows that the judgment of the Court below should be

Affirmed.

[fol. 26] JUDGMENT

Extract from the Minutes of April 30th, 1947

No. 11849

MRS. ABA BADGER, Widow of John G. Suttle, Individually and as Administratrix of the Estate of John G. Suttle, Deceased, etc.,

versus

REICH BROS. CONSTRUCTION CO., et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Mrs. Aba Badger, widow of John G. Suttle, individually and as administratrix of the estate of John G. Suttle, deceased, etc., and the surety on the appeal bond herein, National Surety Corporation of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

PETITION FOR REHEARING—Filed May 21, 1947

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

No. 11,849

MRS. ABA BADGER, widow of JOHN G. SUTTLE, individually and as administratrix of the Estate of JOHN G. SUTTLE, deceased, etc.,
Appellant,

versus

REICH BROS. CONSTRUCTION CO., ET AL.,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

PETITION FOR REHEARING BY APPELLANT.

May It Please the Court:

Appellant herein respectfully petitions this Honorable Court to grant unto her a rehearing of the case herein, and a resubmission of the points at issue and the principles of law that should govern, and for cause, with utmost deference and respect, represents to the Court that in the opinion and judgment rendered herein on April 30th, 1947, this Honorable Court upon a misunder-

standing, as we sincerely believe, of the position and contention of Appellant and upon a misunderstanding of the issues and principles of law presented, erred in law in the following respects, to-wit:

POINT 1

The Court erred in holding that the jurisdiction of the Federal Courts was an issue involved in the case herein, and in holding that the jurisdiction of the Federal Courts would be affected by the issue of law on the question of venue presented by this case.

POINT 2

The Court erred in holding as a matter of law that the terms "inhabitant", "resident" and "citizen" as used in the Federal venue and jurisdiction statutes are identical with the term "citizen" as used in the jurisdiction statutes of the Federal Courts.

POINT 3

The Court e.. in holding that residence as required by Federal venue statutes is a status determined by Federal law, rather than by State law.

POINT 4

The Court erred in overlooking or not considering the facts that by doing business with the Corporation in Louisiana the Partnership Appellees consented to be sued in any district in which jurisdiction was proper as to the Corporation.

POINT 5

The Court erred in holding in effect that the Federal venue statutes are subject to as strict an inter-

pretation as the Federal jurisdiction statutes, and further erred in disregarding the present tendency of the Federal Courts toward a more liberal interpretation of the Federal venue statutes.

POINT 6

The Court erred in holding, in effect, that it was beyond the power and authority of the State of Louisiana to pass a law conferring "residence" on foreign corporations meeting the conditions established by the State.

POINT 7

The Court erred in the *obiter dictum* to the effect that a foreign corporation which acquired "residence" in Louisiana could not be sued by a Louisiana Citizen in a federal court. This would not be true of an individual citizen of another state who had acquired "residence" in Louisiana and is not true as to such a corporation.

We most respectfully urge the Court that in the interest of justice, and because of the far reaching effect of the decision of this Honorable Court on the question of Federal venue, that the Appellants are entitled to a rehearing.

Respectfully submitted,

ENGLE, LAUB,
ADAMS & FORMAN,
MILLER & BLOCH,
CHAS. F. ENGLE,
JOHN D. MILLER,
Attorneys for Petitioner.

[fol. 30] ORDER DENYING REHEARING

Extract from the Minutes of May 31st, 1947

No. 11849

MRS. ABA BADGER, Widow of John G. Suttle, Individually and as Administratrix of the Estate of John G. Suttle, Deceased, etc.,

versus

REICH BROS. CONSTRUCTION CO., et al.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 32] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.